MUHAMMAD ZAIHASRI HASSAN v. PACIFIC & ORIENT INSURANCE CO BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[ORIGINATING SUMMONS NO: WA-24NCC-324-08-2017]
9 MARCH 2018

ROAD TRAFFIC: *Insurance – Third party claims – Claim against insurance company for liability of insured – Insurance company obtained order declaring insurance policy issued against insured void and unenforceable – Whether insurance company could avoid liability – Whether insurance company entitled to obtain benefit of declaratory order – Whether applicant should have commenced separate proceedings against insurance company – Whether application pursuant to s. 96(1) of Road Transport Act 1987 was 'recovery proceedings' – Whether insurance company liable to pay judgment sum – Whether insurance company entitled to raise defence of fraud – Road Transport Act 1987, s. 96(1), (2)(a), (3)*

The applicant claimed to have been involved in a road accident. His version was that the motorcycle he was riding was hit from behind by another motorcycle, ridden by one Ahmad Firdaus ('Firdaus'), owned by one Khairul Azznil ('Azznil') and insured by the respondent. Following the accident, the applicant sent a notice under s. 96(2)(a) of the Road Transport Act 1987 ('RTA') to the respondent. Subsequently, the applicant commenced a writ action at the Magistrates' Court against Firdaus and Azznil, seeking damages for their purported negligent conduct. Azznil was initially represented by the solicitors appointed by the insurer. However, the insurer obtained an order ('declaratory order') from the High Court, declaring that the insurance policy issued by the insurer to Azznil was void and unenforceable. The declaration was obtained on the basis of a statutory declaration affirmed by Azznil stating, *inter alia*, that his motorcycle had not in fact been involved in the accident and that Firdaus had been paid in order to make a false police report in connection with the accident. There was no prior notice of the originating summons action was given to the applicant. The solicitors appointed by the insurer were then discharged from representing Azznil in the writ action before the Magistrates' Court and a judgment in default was entered in favour of the applicant against Firdaus and Azznil. By the originating summons ('OS') application herein, the applicant sought, amongst others: (i) a declaration that the declaratory order was unenforceable against the applicant; (ii) an order that the insurer was not entitled to obtain the benefit of the declaratory order; and (iii) an order that the insured pay to the applicant the judgment sum, interest and costs awarded to the applicant pursuant to the writ action. The insurer raised a preliminary objection that

A the applicant did not have any legal basis for the application because one High Court could set aside a regularly obtained final judgment of another High Court unless there was illegality or lack of jurisdiction due to a breach of written law.

Held (allowing application in part):

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(1) The applicant did not seek to set aside the declaratory order but sought a declaration that the declaratory order did not apply to him. The application was entirely appropriate as the earlier order should continue to operate as between the insurer and Azznil, the insured. In any event, it was open to the applicant to contend that the declaratory order had been granted in excess of jurisdiction, as the conditions that were to have been met by the insurer had not been fulfilled for the declaration to be granted. The preliminary objection was thus dismissed. (paras 10-12)

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(2) Section 96(1) of the RTA creates a statutory obligation on an insurer to make payment to a claimant who has obtained a judgment against an insured. However, s. 96(3) permits an insurer to avoid liability under s. 96(1) if it is able to obtain a declaration from the court that the insurance was void or unenforceable. However, an insurer may only obtain the benefit of s. 96(3) if the declaration is obtained 'before the date the liability was incurred'. If the claimant has already obtained a judgment, it is not open to the insurer to obtain declaratory relief under s. 96(3). Further, if adequate notice under s. 96(3) of the RTA had not been given to the applicant, the declaratory order ought not have any effect against the applicant. Hence, the applicant's prayer in para (i) was granted. (paras 15-22)

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(3) The prayer that the insurer was not entitled to obtain the benefit of the declaratory order was disallowed as the declaratory order ought still to take effect as between the insurer and the insured, Azznil. (para 23)

(4) Section 96 of the RTA is intended to allow a claimant to be able to obtain satisfaction of its judgment sum in a timely manner, by proceeding directly against the insurer. The OS had been commenced by the applicant under and pursuant to s. 96(1) of the RTA and therefore, the proceedings were 'recovery proceedings' as the applicant, being the plaintiff in the liability action, was seeking to make the insurer liable for the acts of the tortfeasor. Hence, the contention that the applicant must commence separate proceedings in order to claim the judgment sum from the insurer was misplaced. (paras 29, 30 & 36)

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(5) The insurer was within its rights to raise the defence of fraud against the applicant, Firdaus and Azznil in resisting the applicant's prayer for the insurer to be directed to pay the judgment sum to the applicant. Based on the sworn statutory declaration of Azznil, the insurer contended that the accident never happened. It followed that the applicant must have been complicit in or privy to the fraud. Therefore, to require the insurer to pay the judgment sum without, first, determining the contention of fraud on its merit, would amount to permitting the provisions of a statute to be used as an instrument of fraud. Hence, the applicant's prayer for an order that the insurer be directed to pay the judgment sum under the liability proceeding was disallowed. (paras 35-39)

(6) The court, in the exercise of its discretion under O. 28 r. 8 of the Rules of Court 2012, directed that the OS be converted into a writ action and that pleading be filed on order that a trial be conducted in order to determine the question of whether the accident had indeed taken place in the manner contended by the applicant. (para 39)

Obiter:

(1) The current rules pertaining to third party motor vehicle claims against insurers permit multiple proceedings to be commenced over the same span of time, which could not be an efficient use of the often-limited resources available for the administration of justice. It would be far better for there to be a single set of proceedings where all the contentions of the affected parties may be finally determined by a single arbiter. The streamlining of the procedures should also achieve the aim of reducing the costs of access to justice which, in turn, would result in the reduction in operating costs and costs of compliance for insurers. This is an area of law that is ripe for reform. (paras 54 & 55)

Case(s) referred to:

AmGeneral Insurance Bhd v. Iskandar Mohd Nuli [2016] 2 CLJ 1 CA ***(refd)***
Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd [2015] 9 CLJ 552 CA ***(refd)***
Letchumanan Gopal v. Pacific & Orient Co Sdn Bhd [2011] 5 CLJ 866 CA ***(foll)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors [2017] 4 CLJ 572 CA ***(refd)***
Rasip Hamsudi & Ors v. Pacific & Orient Insurance Co Bhd [2015] 7 CLJ 984 HC ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Legislation referred to:

Road Transport Act 1987, ss. 91, 96(1), (2)(a), (3)

For the applicant - Tiong Hou Tseng; M/s NM Tiong & Co
For the respondent - RK Nathan; M/s Vinod Kamalanathan & Assocs

Reported by S Barathi

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JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The applicant, Mohammad Zaihasri Hassan, claimed to have been
B involved in a road accident on 2 May 2013 at the 12th mile of Jalan Hulu Langat. According to him, the motorcycle he was riding was hit from behind by another motorcycle bearing the registration WWG 184. WWG 184 was ridden by one Ahmad Firdaus bin Rosli. WWG 184 was owned by one Khairul Azznil bin Shamsul Bahari. The respondent, Pacific & Orient
C Insurance Co. Berhad, is the insurer of WWG 184.

[2] Following the accident, the applicant sent a notice under s. 96(2)(a) of the Road Transport Act 1987 to the respondent. The applicant subsequently commenced a writ action in the Bandar Baru Bangi Magistrates' Court against Firdaus and Azznil seeking damages for their purported negligent conduct
D that had caused the accident.

[3] Azznil was initially represented by solicitors appointed by the insurer.

[4] The insurer, however obtained an order (the "declaratory order") from the High Court on 10 October 2016 declaring that the insurance policy
E issued by the insurer to Azznil was void and unenforceable. No prior notice of this originating summons action was given to the applicant.

[5] This declaration was obtained on the basis of a statutory declaration affirmed by Azznil on 26 January 2016 stating *inter alia* that his motorcycle had not in fact been involved in the accident and that Firdaus had been paid
F in order to make a false police report in connection with the accident.

[6] The solicitors appointed by the insurer were then discharged from representing Azznil in the writ action before the Magistrates' Court. Judgment in default was subsequently entered in favour of the applicant against Firdaus and Azznil in that writ action.

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[7] By these originating summons, the applicant sought, among others:

(a) for a declaration that the declaratory order is unenforceable against the applicant;

H (b) for an order that the insurer is not entitled to obtain the benefit of the declaratory order; and

(c) for an order that the insured pays to the applicant the judgment sum, interests and costs awarded to the applicant pursuant to the writ action.

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[8] Before embarking on an analysis of the issues, I would make the observation that, if the contents of Azznil's statutory declaration were true, it must necessarily follow that the applicant could not have been hit from behind by WWG 184, and that his claim against the defendants, Firdaus and Azznil was also fraudulent.

The Preliminary Objection

[9] Dato' RK Nathan for the insurer raised a preliminary objection. It was argued that the applicant did not have any legal basis for the application because one High Court cannot set aside a regularly obtained final judgment of another High Court unless there was illegality or a lack of jurisdiction due to a breach of written law: see *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd*[1].

[10] I am of the view that the applicant here did not in fact seek to set aside the declaratory order, but rather simply to seek a declaration that the declaratory order did not apply to him. It was entirely appropriate for the applicant to have sought for a declaration (rather than setting aside the declaratory order), as the earlier order should continue to operate as between the insurer and Azznil, the insured.

[11] In any event, it would have been open to the applicant to contend that the declaratory order had been granted in excess of jurisdiction, as the conditions that were to have been met by insurer had not been fulfilled for the declaration to have been granted.

[12] For this reason, the preliminary objection was dismissed.

The 10 October 2016 Declaration

[13] The applicant's first prayer for relief sought for a declaration that the declaratory order did not apply to the applicant. This issue turns entirely on the proper construction of the proviso to s. 96(3) of the Road Transport Act 1987, relating to the question of when notice must be given by an insurer which is seeking a declaration that a policy is void and unenforceable.

[14] Section 96(1) of the Road Transport Act 1987 creates a statutory obligation on an insurer to make payment to a claimant who has obtained judgment against an insured. Such payment must be made in satisfaction of the judgment. The language used in s. 96(1) is as follows:

> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the

A persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[15] Section 96(3) permits an insurer to avoid liability under s. 96(1) if it B is able to obtain a declaration from the court that the insurance was void or unenforceable. However, in order to be able to obtain such declaration, the insurer must fulfil certain conditions:

(a) the declaration must be obtained before the third-party claimant obtains judgment against the insured;

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(b) if the third-party claimant has already commenced an action against the insured, the insurer must give notice to the third-party claimant that the insurer is seeking to declare the policy void and unenforceable. Such notice must be given no later than seven days after the insurer commenced proceedings for the declaration; and

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(c) such notice must specify the grounds upon which the insurer proposes to rely in order to obtain the declaration that the policy was void and unenforceable.

[16] Of course, no notice need be given if the third-party claimant has not E yet commenced any action against the insured. This is an ellipsis in sub-s. (3), but can be inferred from the context of s. 96 as a whole.

[17] The precise language used in sub-s. (3) is reproduced here:

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration F from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or G within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

H **[18]** Dato' RK Nathan for the insurer contended that, on its true construction, the proviso only creates an obligation on the insurer to give notice to the third-party claimant where the claimant has obtained judgment before the insurer commences its action to declare the policy void. Counsel submitted that, once the claimant has obtained judgment, the insurer must I give notice before, or within seven days after, commencing its action to obtain declaratory relief under s. 96(3) of the Road Transport Act 1987.

[19] I am unable to agree.

[20] The first reason is that an insurer may only obtain the benefit of s. 96(3) if it obtains the declaration "before the date the liability was incurred". This has been construed by the courts to mean the date on which judgment was obtained in the liability action: see *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd*[2], a decision of the Court of Appeal. It was argued in that case that the phrase "the date the liability was incurred" referred to the date of accident. This was roundly rejected by the Court of Appeal after an in-depth analysis into the construction of sub-s. (3). Accordingly, if the claimant has already obtained judgment, it would not be open to the insurer to thereafter obtain declaratory relief under s. 96(3). For this reason, the contention of learned counsel for the insurer cannot stand.

[21] The second reason is that this very point has been considered by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors*[3], where it was held that the failure by the insurer to serve on the third-party claimant the requisite notice amounted to a contravention of s. 96(3) of the Road Transport Act 1987. The Court of Appeal, in unequivocal terms, held as follows:

> [38] We … found no merits in submissions of the appellant's counsel that there was no basis or a need for the first, second and third respondents to bring proceedings pursuant to saman pemula-2 to quash the declaratory order obtained by the appellant in saman pemula-1. On a plain reading of s. 96(3) of the RTA in its entirety *it was clearly incumbent upon the appellant to give notice of the proceedings under saman pemula-1 (together with the grounds relied upon) to the first, second and third respondents and this the appellant had conceded had not been done.* (emphasis added)

[22] It follows therefore that if adequate notice under s. 96(3) of the Road Transport Act 1987 had not been given to the applicant, the declaratory order ought not have any effect against the applicant. I therefore granted the applicant's prayer for relief in para. (a) of the originating summons in encl. 1.

[23] The applicant also sought for an order that the insurer not be entitled to obtain the benefit of the declaratory order. I refused this prayer, as the declaratory order ought still to take effect as between the insurer and the insured, Azznil.

Recovery Proceedings

[24] In the applicant's third prayer for relief, he sought for an order directing the insurer to make payment in satisfaction of the judgment that was obtained in the liability action.

[25] Counsel for the insurer countered that the applicant must commence separate recovery proceedings against the insurer in order to obtain satisfaction of his judgment sum. The short answer to this contention is that, the proceedings that were before this court were in fact recovery proceedings, as the proceedings have been commenced under and pursuant to s. 96(1) of the Road Transport Act 1987.

[26] At common law, a person seeking to claim against a tortfeasor has no means to proceed against the tortfeasor's insurer because no privity exists between them. If the insurer disputes its liability under the policy, the claimant would have no choice but to proceed to establish liability against the insured and thereafter seek to utilise the usual modes of enforcement in order to obtain satisfaction of its judgment. Ultimately, the claimant may seek for an order declaring the insured bankrupt. The trustee in bankruptcy would thereafter be vested with the right to claim against the insurer. If any amount is paid by the insurer under the policy, such sums would not accrue solely for the benefit of the claimant, but would be paid into the general pool of assets for distribution to the unsecured creditors *pari passu*.

[27] Many jurisdictions have in place legislation that modifies this common law position. In some cases, the general law of contract is modified to permit non-parties to claim the benefit under a contract in certain circumstances. In Malaysia, the law is modified specifically in connection with third party motor vehicle claims by s. 96 of the Road Transport Act 1987.

[28] The scope of s. 96 has been explained at length by Vazeer Alam J in *Rasip Hamsudi & Ors v. Pacific & Orient Insurance Co Bhd & Ors*[4]. I can do no better than to reproduce the relevant passages here:

> [7] Ordinarily a non-motor third party risk insurance policy works on the basis of contractual principles in which the insurer indemnifies the insured in respect of any third party claims to which the insured becomes liable, and in such policies there is no direct nexus between the insurer and the third party such that the third party makes a direct claim against the insurer.
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> [8] However, by virtue of the provisions of the Road Transport Act 1987, a third party risk motor insurance policy works differently. Pursuant to s. 96(1) of the Road Transport Act 1987, a third party who has obtained a judgment against the insured in a third party risk motor insurance policy can directly seek payment from the insured provided that the third party had in respect of such judgment complied with the provisions of s. 96(2)(a) of the Road Transport Act 1987, particularly the requirement to serve the insurer with a notice of the proceedings, before or within seven days after the commencement of the proceedings in which the judgment was given and further provided that none of the other qualifying provisos in s. 96(2) of the Road Transport Act 1987, applied.

[9] Part IV of the Road Transport Act 1987, entitled – "provisions against third party risks arising out of the use of motor vehicles" provides the legislative scheme in respect of mandatory third party risk motor insurance policy cover for motor vehicles used on roads. This is provided in s. 90(1) of the Road Transport Act 1987 that reads:

> Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

[10] The learned Ariffin Zakaria FCJ (now CJ) in speaking for the Federal Court in the case of *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209; [2009] 1 MLJ 21 FC, reaffirmed the fundamental rule of statutory interpretation, that is, the courts must give effect to the intent of the legislature, and that intention has to be found by an examination of the language used in the statute as a whole. When the Road Transport Act 1987, in particular Part IV thereof is examined as a whole, it is clear that the intent of Parliament was to put in place a mandatory third party risk motor vehicle insurance scheme, by which any third party who has suffered damage occasioned by a motor vehicle user insured under the scheme would be statutorily indemnified by the insurance company issuing the policy of insurance.

[11] This legislative scheme was recognised by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54, where the learned Md Raus Sharif PCA in delivering the judgment of the court had adopted with approval the view expressed by S Santana Dass at p. 230 of his book entitled *'The Law of Motor Insurance'* to the following effect:

> ... if a judgment has been entered against the insured/driver and he does not pay the judgment, the third party can enforce the judgment directly against the insurer under Section 96 of the RTA. Section 96 allows a direct action by the third party against the insurer "with respect to a matter which is required to be covered by a policy of insurance". The policy must cover any liability which may be incurred by the insured arising out of the use of the motor vehicle by him.

The Court of Appeal in that case further held that:

> The right of the respondent as a third party to approach the court for redress against the appellant, who itself is not a tortfeasor and with whom the respondent had no contractual relationship arises from statutory empowerment under s. 96 of the RTA 1987. The mechanism of s. 96 of the RTA 1987 operates thus: there is a statutory obligation created by s. 96 of the RTA 1987 on the part of the insurer (appellant) on being so notified on the failure of the

A insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and as said earlier is an exception to the concept founded upon privity of contract.

[29] Section 96 of the Road Transport Act 1987 is thus intended to allow B a claimant to be able to obtain satisfaction of its judgment sum in a timely manner, by proceeding directly against the insurer. However, in order to avail himself of the cause of action afforded by s. 96(1), the claimant must have given notice to the insurer of his action against the insured, pursuant to s. 96(2)(a). The reason for this is to allow the insurer to intervene in the C claimant's action and to defend its liability. Nonetheless, if a claimant fails to give such notice, that does not stop him from proceeding with his action against the insured, but he must rely upon the common law in order to obtain relief against the insurer.

[30] This originating summons has been commenced by the applicant D under and pursuant to s. 96(1) of the Road Transport Act 1987. Therefore, these proceedings are in fact the "recovery proceedings", because the applicant, being the plaintiff in the liability action, is now seeking to make the insurer liable for the acts of the tortfeasor.

[31] Dato' RK Nathan referred the court to the decision of the Court of E Appeal in *Letchumanan Gopal v. Pacific & Orient Co Sdn Bhd*[5], where it was held that the liability and recovery actions were separate proceedings (which therefore meant that it was open to the claimant to commence subsequent recovery proceedings). The Court of Appeal was also of the view that it would be open for the insurer to raise all and any defences available to it at F the recovery proceedings and that *res judicata* would not apply to the insurer as it was not a party to the earlier liability proceedings.

[32] The first observation is that Letchumanan's action in that case was in fact a "recovery action" as it was commenced pursuant to s. 96(1) of the Road Transport Act 1987. In that case, an action was commenced by G Letchumanan at the Sessions Court against the insurer, after he had first obtained judgment against the tortfeasor. The premise of subsequent action was the insurer's statutory liability under s. 96(1) .

[33] The brief facts of this case were as follows. Letchumanan's brother, Kanisan, was a passenger in a lorry driven by one Katurajah Subramaniam. H The lorry was involved in an accident, as a result of which Kanisan died. Letchumanan, in his capacity as a representative of the estate of his mother, commenced a dependency claim at the Taiping Sessions Court against Katurajah and his employer, Syarikat Jagoh Angkat Sdn Bhd. The court found that Katurajah was negligent and that his employer was vicariously I liable for his negligent act.

[34] The facts of the reported decision do not indicate that the insurer had sought to obtain a declaration pursuant to s. 96(3). Despite this, the Court of Appeal was of the view that it was open to the insurer to raise the defence that the terms of the policy excluded liability to passengers who were not employees of the insured company. The reason that this was so was that s. 96 must be read together with s. 91 of the Road Transport Act 1987 (which defines the category of persons who may claim the benefit of an insurance policy). Abdul Malik Ishak JCA explained:

> [26] Section 96(1) of the RTA imposes a duty on the part of the insurers to satisfy judgments against persons insured in respect of third party risks. If the insurers refuse to satisfy the judgments, then the plaintiffs – be it the dependants or injured victims of the tortfeasors' negligence, have a legal right under s. 96(1) of the RTA to file a writ against the insurers.
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> [27] Section 96(1) of the RTA must be construed literally by looking at the language employed by Parliament and giving it its ordinary and natural sense. This is the literal approach and it has been explained by Higgins J in *The Amalgamated Society of Engineers v. The Adelaide Steamship Company Limited And Others* [1920] 28 CLR 129, at pp 161-162, in this way:
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> > The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.
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> [28] At this juncture, it is ideal to reproduce s. 96(1) of the RTA. It reads as follows:
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> > Duty of insurers to satisfy judgements against persons insured in respect of third party risks
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> > 96(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

A [29] And it allows a party who has no contractual relationship with the insurers and who has no claim in tort against the insurers to file a suit against the insurers. However, s. 96(1) of the RTA cannot be read in isolation. It must be read with s. 91 sub-s (1)(a) and sub-s. (1)(b) of the RTA and they are worded as follows:

B Requirements in respect of policies

91(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which:

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

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(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:.

D [30] In plain language, it means that for a motor vehicle insurance to be valid, the policy must be issued by a licensed insurance company and it must cover 'such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred' by those persons which result in death or bodily injuries to other persons arising out of the use of the motor vehicle. Thus, the obligation of the insurers to pay

E judgments under s. 96(1) of the RTA will only arise if it can be shown that the tortfeasors are persons that fall within the class of persons covered by the policy.

[35] On the authority of the decision of the Court of Appeal in *Letchumanan*'s case, I am of the view that the insurer is within its rights to

F raise the defence of fraud. It should not matter whether the insurer had previously obtained a s. 96(3) declaration and that I have ruled that declaration to be ineffective against the applicant. If in *Lechumanan*'s case, the insurer was free to contend that terms of the policy did not cover the liability claimed even where a declaration under s. 96(3) was not sought, so

G it must be that where a declaration was previously obtained but is now circumscribed, the insurer should be similarly free to raise its contended defences.

[36] The legal position may thus be summed up in the following manner:

H (a) Dato' RK Nathan's contention that the applicant must commence separate recovery proceedings in order to claim the judgment sum from the insurer is misplaced, because the current proceedings before me are in fact the recovery proceedings, as it had been commenced pursuant to s. 96(1) of the Road Transport Act 1987; and

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(b) the insurer would be well entitled in these proceedings to raise the contention of fraud on the part of the applicant, Firdaus and Azznil (being the defendants in the liability action) in resisting the applicant's prayer for the insurer to be directed to pay the judgment sum to the applicant.

[37] Of course, fraud is not a matter that is capable of being determined merely based on affidavit evidence. In the present case, although the primary relief claimed is declaratory in nature, the applicant also sought for an order for the insurer to pay to the applicant the judgment sum together with interests and costs obtained at the liability proceedings.

[38] It would be iniquitous for this court to direct that payment be made by the insurer in satisfaction of the judgment in default without the issue of fraud having been heard and determined on its merits. It will be recalled that the insurer contended that the accident had never happened, based on a sworn statutory declaration of the insured, Azznil. If this is indeed true, it follows that the applicant here must have been complicit in, or somehow privy to, the fraud. To require the insurer to pay the judgment sum without having first determined the contention of fraud on its merits would, in my view, be to permit the provisions of a statute to be used as an instrument of fraud, which is a matter that this court would not countenance.

[39] In the light of the foregoing:

(a) I refused the applicant's prayer for an order that the insurer be directed to pay the judgment sum under the liability proceedings; and

(b) I exercised the court's discretion under O. 28 r. 8 of the Rules of Court 2012 to direct that the originating summons be converted into a writ action and that pleadings be filed in order that a trial be conducted in order to determine the question of whether the accident had indeed taken place in the manner contended by the applicant.

[40] It may be contended for the applicant that the court's directions above would permit the insurer a third bite at the proverbial cherry. The answer to this is that the insurer would have been perfectly entitled to have instructed the solicitors whom it had appointed for the tortfeasor and the insured to discharge themselves, so as to avoid any contention that it had waived any right to deny policy liability. Until the decision of the Court of Appeal in *AmGeneral Insurance Bhd v. Iskandar Mohd Nuli*[7] delivered in December 2015 (and which was subsequently affirmed by the Federal Court), there was no authority for the proposition that an insurer may validly reserve its position regarding policy liability in such a case. Secondly, *Letchumanan*'s case provides support for the positon that the insurer would be entitled to raise all and any defences that it may have in any recovery proceedings.

A **Can A Claimant Directly Enforce A Liability Judgment Against An Insurer?**

[41] A great deal of time and effort was expended in submissions before me on the question of whether a claimant may directly enforce a liability judgment (obtained against a tortfeasor) directly against the tortfeasor's insurer. Counsel for the insurer argued that the decision of the court of Appeal in *Rasip*'s case was *per incuriam*, and that accordingly I am not bound by that decision.

[42] I am of the view that this question does not arise in the present case, because, as I have held above, these proceedings before me are in fact the recovery proceedings. The discussion that follows is thus of academic interest only.

[43] The Court of Appeal in *Rasip*'s case held that no separate recovery need be commenced by the claimant once he obtains judgment against the insured:

> [34] Further, the decided authorities were all stacked up against the appellant that no separate recovery proceedings had to be taken against the insurer once a judgment had been obtained by a third party against their insured. There would therefore be no further proceedings where the declaratory order obtained by the insurer could be challenged if it was wrongfully secured in violation of statutory requirements including the proviso to s. 96(3) of the RTA.
>
> [35] In *Pacific & Orient Insurance Co Bhd v. Muniamah Muniandy* [2011] 1 CLJ 947, this court had this to say on the issue of recovery against an insurer under the mandatory third-party risk insurance requirements of the RTA:
>
> > [21] Nowhere does s. 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s. 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s. 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.
> >
> > (emphasis added)
>
> (see also *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54).

> [36] With respect, we were therefore also of the view that it was rather disingenuous of counsel for the appellant to suggest that the first, second and third respondents would have some other opportunity to challenge the declaratory order obtained by the appellant *vide* saman pemula-1. Once judgment had been entered in the Selayang Sessions' proceeding (unless stayed or overturned), the first, second and third respondents were entitled to immediately enforce the judgment obtained against the insured by any appropriate execution mode levied on the insurer.

[44] Reliance was placed by the Court of Appeal in *Rasip*'s case on its earlier decision in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy*[8]. In this case Muniammah was a cyclist who was hit by a motorcycle ridden by the insured M Sekar Marimuthu. In the liability proceedings, the insured was found to be liable to Muniammah in negligence. The judgment of Ramly Ali JCA describes the background facts in the following terms:

> [2] The appellant, being an insurance company, was at all material times the insurer of the motorcycle KN 6162 ridden by one M Sekar a/l Marimuthu which was involved in a road accident with the respondent, a pedal cyclist, on 11 May 1997.
>
> [3] The respondent filed an action to recover damages against the said M Sekar a/l Marimuthu at the Sessions Court. Nevertheless, the Sessions Court dismissed the respondent's action with costs.
>
> [4] The respondent appealed to the High Court against the said dismissal. The High Court had on 16 December 2009 allowed the respondent's appeal where it was held that the said M Sekar a/l Marimuthu was 100% liable for the accident. The High Court ordered the said M Sekar a/l Marimuthu to pay the respondent RM89,374.03 (for general and special damages).
>
> [5] Being dissatisfied with the High Court's decision, the appellant then filed an application for leave to appeal to the Court of Appeal and such application was allowed by the Court of Appeal on 19 February 2010. The appellant then proceeded to file the notice of appeal on 1 April 2010.
>
> [6] In the meantime, the appellant applied for a stay of execution at the High Court. The application was dismissed. The appellant then filed the same application for stay of execution at the Court of Appeal, and the said application is still pending.
>
> [7] The appellant, as insurer of the said motorcycle, did not make payment to the respondent on the said judgment. The respondent then through her solicitors issued and served a notice under s. 218(2)(e) of the Companies Act 1965 to the appellant (the 218 notice) on 25 March 2010.

[45] It will be clear from the passages above that the insurer was a party to the liability action. Based on the facts of this case, at the time the appeal against the High Court's refusal to grant a *Fortuna* injunction came to be heard before the Court of Appeal, the insurer's appeal against the High Court's finding of liability was still pending (see para. 5 in the excerpt above).

[46] It stands to reason that once the insurer has been made a party to the liability proceedings, it will no longer be necessary for separate recovery proceedings to be filed pursuant to s. 96(1) of the Road Transport Act 1987. Any finding of liability by the court will automatically bind the insurer. In that case, it is likely that the insurer had applied to intervene in the liability action. Of course, if the insurer has applied to intervene, it would have been open to the insurer to reserve its rights to argue that the policy in question did not cover the liability claimed. With such a reservation, the insurer would not be taken to have waived its right to raise all and any defences that it may have in order to avoid liability under the policy. However, such defences must be raised in the liability proceedings itself, because the insurer has opted to be made a party to such proceedings.

[47] In my respectful view, the *ratio decidendi* of the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* must be understood in the light of the facts of the case. Because the insurer was already a party to the liability proceedings, no further recovery action under s. 96(1) was needed against it. The judgment in the liability proceedings was binding on the insurer.

[48] The facts of *Rasip*'s case bear a striking similarity to the facts in this present case. In *Rasip*'s case, the first plaintiff, Rasip Hamsudi, was involved in a motor accident in Rawang just six days before his nineteenth birthday. The motorcycle he was riding was hit from the rear by another motorcycle ridden by the first defendant, Mohammad Al-Imran Harun. As a result of the accident, Rasip was paralysed from the neck down.

[49] Rasip and his parents (in their capacity as litigation representatives) commenced a suit against Al-Imran and the owner of the motorcycle ridden by Al-Imran (being the insured) at the Sessions Court in Selayang. The insurer in that case applied to intervene in the liability action, contending that the insured's motorcycle was not in fact involved in the accident. The insurer also appointed the firm of Azim, Tunku Farik & Wong to act for Al-Imran and the insured in the liability proceedings. While the liability proceedings was pending, the insurer sought for and obtained a declaration pursuant to s. 96(3) of the Road Transport Act 1987. However, no notice of this action was given to Rasip or his parents.

[50] Having obtained the declaration, the insurer then instructed the firm of Azim Tunku Farik & Wong to discharge themselves as solicitors for Al-Imran and the insured in the liability proceedings. However, it will be noted that no application was made to remove the insurer as a defendant in the liability proceedings. The plaintiffs obtained judgment in their favour at the Sessions Court.

[51] The plaintiffs then commenced an action at the High Court seeking to set aside the declaration obtained by the insurer. Although the High Court refused to set aside the declaration, it declared that the insurer was "not entitled to the benefit of the declaratory order as against the judgment obtained by the plaintiffs in the Sessions Court suit"[9]. This decision was affirmed by the Court of Appeal.

[52] The following observations may be made:

(a) if the insurer was not removed as a party to the liability proceedings, it would follow that once the High Court granted the declaration that disentitled the insurer from relying upon the earlier declaratory order, the insurer's obligations in the liability proceedings became crystallised at that point. Accordingly, the Court of Appeal was entirely correct to have stated that no separate recovery proceedings were necessary, for the insurer's liability in the liability proceedings were resurrected following Vazeer Alam J's order; and

(b) even if that were not the case, the originating summons commenced by the plaintiffs at the High Court was premised upon s. 96(1) of the Road Transport Act 1987. That this was so can be seen in the intitulement to the action, reproduced below:

SAMAN PEMULA NO: _____

DALAM PERKARA SEKSYEN 96(1) AKTA PENGANGKUTAN JALAN 1987;

DAN

SILA HADIR PENGURUSAN KES DI HADAPAN PKP/~~TP/YA HAKIM~~

DALAM PERKARA SEKSYEN 96(3) & (5) AKTA PENGANGKUTAN JALAN 1987;

DAN

PADA 24 Feb 2015
JAM 9.00 pagi
MAHKAMAH NCVC 6
ARAS 4, TENGAH

DALAM ATURAN 7 KAEDAH-KAEDAH MAHKAMAH 2012;

DAN

Although the principal relief prayed for by the plaintiffs was for a declaration to quash the earlier declaration obtained by the insurer, the plaintiffs also prayed for all other reliefs as the court considered appropriate. Accordingly, it would have been open to the court to direct that the insurer pays the judgment sum awarded in the liability proceedings. Just like in the present case, the originating summons commenced by Rasip and his parents at the High Court were effectively the recovery proceedings, premised upon the statutory cause of action conferred upon third-party claimants by s. 96(1) of the Road Transport Act 1987.

[53] As a corollary of the preceding paragraphs, the contention by counsel for the insurer that the decision of the Court of Appeal in *Rasip*'s case was *per incuriam* is, in my considered and respectful opinion, baseless and devoid of merit.

Post Script

[54] The lay reader who has persevered to the end of this judgment will be left with the impression that the law regarding third party motor vehicle claims against insurers is unnecessarily complicated and quite unsatisfactory. He or she cannot be blamed for having arrived at that conclusion. The current rules permit for multiple proceedings to be commenced over the same span of time, which in my view, cannot be an efficient use of the often-limited resources available for the administration of justice. It would be far better for there to be a single set of proceedings where all the contentions of the affected parties may be finally determined by a single arbiter.

[55] The streamlining of the procedures should also achieve the aim of reducing the costs of access to justice, which in turn would result in the reduction in operating costs and costs of compliance for insurers. This is an area of law that is ripe for reform.

Endnotes:

1. [2013] 6 CLJ 673; [2013] 4 AMR 385; [2013] 5 MLJ 1; [2013] 5 MLRA 175.
2. [2015] 9 CLJ 552; [2015] 4 AMR 329; [2015] 6 MLJ 437.
3. [2017] 4 CLJ 572; [2017] 2 MLRA 659.
4. [2015] 7 CLJ 984; [2015] 2 AMCR 438.
5. [2011] 5 CLJ 866; [2011] 4 AMR 780; [2011] 6 MLJ 788; [2011] 1 MLRA 374.
6. See para. 25 of the judgment of Abdul Malek Ishak JCA.
7. [2016] 2 CLJ 1; [2016] 1 MLJ 818; [2016] 2 MLRA 94.
8. [2011] 1 CLJ 947; [2011] 1 AMR 685; [2010] 3 MLRA 263.
9. *Op. cit.,* footnote 4.